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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 863

JOHN HALUN, *Petitioner*,

v.

EMORY M. JONES, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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EMORY M. JONES, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN HALUN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on November 22, 1961.

OPINION BELOW

The opinion in the court below (Appendix A, *infra*, pp. A1-A4) has not yet been reported.

JURISDICTION

The judgment of the court below was entered on November 22, 1961.

Timely petitions for rehearing and for a rehearing in banc were denied on January 11, 1962 (Appendix B (1), (2), *infra*, pp. A4-A5).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In an action by John Hahn for damages arising out of an automobile collision, the trial judge ruled as a matter of law that the owner was liable for the negligence of the permittee of the owner's son, and left to the jury only the question of damages. The Court of Appeals reversed and directed judgment for the owner.

The question presented is whether in view of the principles enunciated in *Quock Ting* v. *United States*, 140 U.S. 417, and in view of decisions of other Circuit Courts, the court below was justified in reversing the judgment and directing judgment for the owner; and whether, at the very least, the court below should not have ordered a new trial.

STATUTE INVOLVED

D. C. Code § 40-424 (1961) provides as follows:

> "Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be

prima facie evidence that such person operated said motor vehicle with the consent of the owner."

STATEMENT

Emory M. Jones, Sr., bought an automobile on September 23, 1957. He told his son he could use the car, with two restrictions: first, the son would have to return the car by midnight and, second, no one was to drive the car but the son while it was in his possession. On Wednesday, October 2, 1957, the son used the car and kept it out beyond midnight. For this, the father kept the car from his son until Monday night, October 7, 1957. On this occasion, one Griffin was driving, with the son and others in the car, when at a speed of about 70 miles an hour and while fleeing from police, the car collided with and seriously injured John Halun. Halun sued the owner.

The trial court ruled as a matter of law that Griffin was operating the car with the owner's implied consent. The case went to the jury only on damages. From a judgment for Halun, the owner appealed. The court below reversed, entering judgment for the owner, saying (*infra*, p. A3): "In this case the evidence failed to show consent. The evidence that Griffin was operating the appellant's car at the time of the accident, and that the appellant had not consented to his operating it, was not met by any evidence to the contrary. If there had been substantial evidence that the appellant had consented, either expressly or by implication, there would have been a question for the jury. Since there was no such evidence, there was no such question. It could not rationally be thought that the appellee, who was the plaintiff, had discharged his burden of proof. It follows that the appellant was entitled to a directed verdict."

REASONS FOR GRANTING THE WRIT

First: This case, in following the rule previously laid down by the court below in cases arising under the Motor Vehicle Safety Responsibility Act [D. C. Code § 40-424 (1961)] ignores the classic statement of the law by this Court in *Quock Ting* v. *United States*, 140 U.S. 417. This it does in two important respects:

(1) The court below read the evidence in the instant case as requiring a directed verdict for the owner of the striking car. This evidence consisted solely of the testimony of the owner, his wife, and his son; that the son was not to allow anyone else to drive the vehicle. Obviously, such a restriction laid down in the privacy of the owner's family gathering, could not be directly contradicted by petitioner. But implicit in such self-serving testimony are all of the factors mentioned by this Court in *Quock Ting*, at page 420:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

(2) More importantly, the lower court completely overlooked the fact—borne out by the owner's own testimony—that his son was known to him to be untrustworthy with respect to restrictions on the use of the car. Such a fact could conceivably convince a jury that the owner waived his restriction against driving by others, that the owner knew he could not rely on his son in this respect too. Surely, under the rule of the Supreme Court quoted above, such things could properly be considered by the jury (if they had originally, or on reversal, been given the issue of consent). Since the issue of consent was directed for petitioner at the trial, there has been no right afforded him either at the trial, nor by reversal accompanied by grant of a new trial, to have the trier of facts apply this Court's guides on this question.

It was just such rulings of the lower court in two of its earlier cases that led to criticism by Justices Rutledge and Stephens of that court. Justice Rutledge, in *Rosenberg v. Murray*, 73 App. D.C. 67, felt that the majority were invading the jury's province in passing upon the credibility of the car owner. Justice Stephens, in *Hiscox v. Jackson*, 75 U.S. App. D.C. 293, thought that *Rosenberg v. Murray* was wrongly decided in ignoring the proposition that the credibility and dependability of the owner's testimony—even uncontradicted—is for the jury.

Second. At least one other circuit has rendered a decision which conflicts with the instant case on the general legal question of liability of an owner for the negligence of his child's permittee, involving violation of a similar restriction on the child's use. While the case arrived in court on a collateral matter, *Glens*

Falls Indemnity Co. v. *Zurn et al.*, 87 F. 2d 988, is very much in point. The Seventh Circuit there said:

> "So here the thing the father says was forbidden related to the personnel of the driver of the car, not to what use might be made of it. The three boys were using the car with the permission of the owner."

It is noted that in one other Circuit, the Fourth, in the case of *Harrison* v. *Carroll*, 139 F. 2d 427, that court agreed with the Seventh Circuit on the general issue of use of a car by a child's permittee as being within the scope of the parent-owner's consent, despite a restriction on the child against the driving by any one else. This decision, however, carries with it the connotation of construction of local law, and is therefore cited only for its broad agreement with *Glens Falls Indemnity Co.* v. *Zurn et al.*

CONCLUSION

The ruling below is in conflict, on the main question, with the decision of another Circuit; it ignores guides laid down by the Supreme Court and in so doing perpetuates in the District of Columbia a rule of law which denies the victims of automobile collisions their rights in the trial of their claims. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Counsel for the Petitioner.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16333

EMORY M. JONES, SR., *Appellant*

v.

JOHN HALUN, *Appellee.*

Appeal from the United States District Court
for the District of Columbia

Decided November 22, 1961

Mr. William H. Clarke, with whom *Messrs. Richard W. Galiher* and *William E. Stewart, Jr.,* were on the brief, for appellant.

Mr. Sol M. Alpher for appellee.

Before EDGERTON, BAZELON and FAHY, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Appellant Emory M. Jones, Sr., owned a car which he allowed his son, Emory M. Jones, Jr., to use. On October 7, 1957, in the District of Columbia, one Eugene Griffin, a stranger to appellant, drove the car recklessly and collided with appellee Halun. Appellant's son was in the back seat. Halun sued appellant, the car owner. The court left to the jury only the question of damages, ruling as a matter of law that Griffin was operating the car with appellant's "implied consent" and that appellant was therefore liable for Griffin's negligence. This appeal is from a judgment for the plaintiff.

Appellant, his wife, and his son testified without dispute that appellant repeatedly forbade the son to let anyone else drive the car. On the night of the accident the son drove to Boonestown, Maryland, with Griffin and three girls as passengers. On the way back to Washington, the son stopped the car at a filling station and got out. Griffin

got into the driver's seat. The son told him to get in the back seat. Griffin said he wanted to drive. The son said "No, I can't do that. This car is not mine." His testimony continued: "So in turn we had a few words right there and the fellow that owned the gas station, he got impatient because the car was blocking his driveway and . . . he told us to move on. Seeing that I couldn't persuade Eugene to get from under the wheel, I just sat in the back seat and told him, said, 'Look, the car is new and it's not mine so don't drive it over 30 miles an hour.'" Griffin was driving at about 70 miles an hour when the car struck the one appellee was driving. Appellant's son had told Griffin to stop and had tried to grab the keys. All this is uncontradicted.

The Motor Vehicle Safety Responsibility Act of the District of Columbia provides that "Whenever any motor vehicle . . . shall be operated . . . by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed to be the agent of the owner . . ., and the proof of the ownership . . . shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner." D.C. Code § 40-424 (1961). An "implied" consent is not a fictitious consent. It is a consent that is not plainly expressed but is inferred as a fact from words or conduct. Making ownership "prima facie evidence" of consent does not dispense with the requirement of consent. It affects only the way consent may be proved. Prima facie evidence is, as WEBSTER'S NEW INTERNATIONAL (1961) says, "evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." The statute creates a rebuttable presumption that the driver of a car involved in an accident had the owner's consent to drive. This means that ownership is sufficient proof of consent until evidence is introduced that the owner did not consent. Since the driver of a car has the owner's consent much more often than not, there is a rational

basis for the presumption. But when substantial evidence of non-consent is introduced, the presumption ceases to operate. Mere ownership is then no longer sufficient proof of consent, either as a matter of sense or as a matter of law. The plaintiff has the burden of proof and it is necessary that the evidence show the owner consented. *Rosenberg* v. *Murray*, 73 App. D.C. 67, 68, 116 F. 2d 552, 553; *Hiscox* v. *Jackson*, 75 U.S. App. D.C. 293, 127 F. 2d 160; *Conrad* v. *Porter*, 79 A. 2d 777, *aff'd*, *Porter* v. *Conrad*, 90 U.S. App. D.C. 423, 196 F. 2d 240; *Hudson* v. *Lazarus*, 95 U.S. App. D.C. 16, 18, 217 F. 2d 344, 346.

In this case the evidence failed to show consent. The evidence that Griffin was operating the appellant's car at the time of the accident, and that the appellant had not consented to his operating it, was not met by any evidence to the contrary. If there had been substantial evidence that the appellant had consented, either expressly or by implication, there would have been a question for the jury. Since there was no such evidence, there was no such question. It could not rationally be thought that the appellee, who was the plaintiff, had discharged his burden of proof. It follows that the appellant was entitled to a directed verdict. *Hudson* v. *Lazarus*, *supra*. Whether the man to whom the defendant had entrusted his car was willing or unwilling that Griffin drive it is immaterial. In *Conrad* v. *Porter*, *supra*, which we *affirmed*, the defendant's truck driver, whom the defendant had forbidden to let anyone else drive his truck, voluntarily lent it to a third person who negligently collided with the plaintiff's car. The Municipal Court of Appeals not only reversed a judgment for the plaintiff but directed entry of a judgment for the defendant. The court said that since uncontradicted testimony showed the truck driver had "been ordered not to allow any third person to drive it, we cannot escape the conclusion that the man who was driving his truck at the time of the accident was not doing so with the express or implied consent of the owner."

So driving, he was not the agent of the owner and the owner was not responsible." 79 A. 2d at 780. Our court not only affirmed that judgment but said: "we conclude that the Municipal Court of Appeals correctly stated and applied the governing principles laid down by this court. We therefore adopt the opinion of the Municipal Court of Appeals". *Porter* v. *Conrad*, 90 U.S. App. D.C. 423, 196 F. 2d 240.

Accordingly the judgment for the plaintiff must be reversed and the District Court directed to enter judgment for the defendant.

Reversed.

APPENDIX B

Orders Below

(1) Order Denying Rehearing

Filed Jan. 11, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 16333

EMORY M. JONES, SR., *Appellant*

v.

JOHN HALUN, *Appellee*.

Before: EDGERTON, BAZELON and FAHY, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's petition for a rehearing before the division and of appellant's opposition, it is

ORDERED by the court that the petition for a rehearing before the division be, and it is hereby, denied.

PER CURIAM.

Dated: Jan. 11, 1962

(2) Order Denying Rehearing En Banc

Filed Jan. 11, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

No. 16333

EMORY M. JONES, SR., *Appellant*

v.

JOHN HALEY, *Appellee*.

Before: WILBUR K. MILLER, Chief Judge, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's petition for a rehearing en banc and of appellant's opposition, it is

ORDERED by the court that the petition for rehearing en banc be, and it is hereby, denied.

PER CURIAM.

Dated: Jan. 11, 1962

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 863

JOHN HALUS, *Petitioner*

v.

EMORY M. JONES, SR., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, EMORY JONES, SR. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 863

JOHN HALEY, *Petitioner*

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EMORY M. JONES, SR., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT, EMORY JONES, SR. IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals is not yet reported, but is set forth correctly in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented is whether the United States Court of Appeals for the District of Columbia Circuit correctly reversed the judgment for Plaintiff in the District Court.

STATUTE INVOLVED

The statute has been stated by Petitioner.

COUNTER STATEMENT

Emory M. Jones, Sr. owned an automobile and he consented to its use on October 7, 1957 by his son, Emory M. Jones, Jr.. On that date, in the District of Columbia, one Eugene Griffin, a stranger to respondent, drove the car recklessly and collided with Petitioner Halun. Jones Jr. was a passenger in the back seat.

Respondent, his wife and son, testified without contradiction that Jones, Sr. repeatedly forbade the son to allow anyone else to drive the car. On the night of the accident, the son drove to Boonestown, Maryland, with Griffin and three girls as passengers. On the way back to Washington, the son stopped the car at a filling station and got out. Griffin got into the driver's seat. The son told him to get in the back seat. At the time Emory M. Jones, Jr. was nineteen (19) years old and weighed one hundred thirty-eight (138) pounds. Eugene Griffin was twenty-one (21) or twenty-two (22) years old and weighed one hundred seventy pounds (170). Griffin said he wanted to drive. The son said, "No, I cannot do that. This car is not mine." His testimony continued. "S[illegible] turn we had a few words right there and the fellow that owned the gas station, he got impatient because the car was blocking his driveway and . . . he told us to move on. Seeing that I

couldn't persuade Eugene to get from under the wheel, I just sat in the back seat and told him, said 'Look the car is new and it's not mine so don't drive is over thirty (30) miles an hour.'" Griffin was driving at about seventy (70) miles an hour when the car struck the one Petitioner was driving. Respondent's son had told Griffin to stop and had tried to grab the keys. All this is uncontradicted.

The trial court ruled as a matter of law that Griffin was operating the car with the owner's implied consent. The case went to the jury only on damages. The United States Court of Appeals for the District of Columbia reversed, entering judgment for the owner. The court stated,

> "Whether the man to whom the defendant had entrusted his car was willing or unwilling that Griffin drive it is immaterial. In *Conrad* v. *Porter* (supra), which we affirmed, the defendant's truck driver, whom Defendant had forbidden to let anyone else drive his truck, voluntarily lent it to a third person who negligently collided with plaintiff's car. The Municipal Court of Appeals not only reversed a judgment for the plaintiff, but directed entry of a judgment for defendant. The Court said that since uncontradicted testimony showed the truck driver had 'been ordered not to allow any third person to drive it, we cannot escape the conclusion that the man who was driving his truck at the time of the accident was not doing so with the express or implied consent of the owner. So driving he was not the agent of the owner and the owner was not responsible.'"

ARGUMENT

No sound reason is offered by Petitioners for the granting of a Writ of Certiorari. Reliance is not placed upon any ground enumerated in Rule 19(b) of this Court. The decision below was predicated upon an interpretation of the common and statutory law of the District of Columbia.

In 1933, the District of Columbia rejected the principle commonly referred to as the "family purpose doctrine," *Turoff* v. *Burch*, 60 App. D.C. 221, 50 F. 2d 986. Title 40, Section 424 of the District of Columbia Code, (supra) has been in effect in this jurisdiction since 1935 and as evidenced by the opinion in the instant case, set out in Petitioner's brief, the Courts have had ample opportunity to interpret the statute. The statute creates a rebuttable presumption that the driver of a car involved in an accident had the owner's consent to drive. However, when substantial evidence of non-consent is introduced the presumption ceases to operate. *Rosenberg* v. *Murray*, 73 App. D.C. 67, 116 F. 2d 552; *Hiscox* v. *Jackson*, 75 U.S. App. D.C. 293, 127 F. 2d 160; *Conrad* v. *Porter*, 79 A. 2d 777, aff'd, *Porter* v. *Conrad*, 90 U.S. App. D.C. 423, 196 F. 2d; *Hudson* v. *Lazaros*, 95 U.S. App. D.C. 16, 217 F. 2d 344.

The case at bar provides a classic example in rebuttal. Substantial evidence was offered to show that there was no consent, express or implied, to operate the vehicle. No evidence was offered by Halun to show consent. Therefore, Title 40, Section 424 of the District of Columbia Code (supra) did not apply and the Court of Appeals ruling was based on the common law doctrine of agency in this jurisdiction.

Petitioner urges that the rule enunciated in *Quock Ting* v. *United States*, 140 U.S. 417, noting exceptions to the general rule that positive testimony as to a particular fact uncontradicted by anyone should control the decision of the Court, is applicable here. In that case, a young Chinaman was seeking entry into the United States. He testified he was born in San Francisco and had spent the first ten years of his life in that city before going to China. Yet, after an absence of six years, he could not recall anything about San Francisco, could not speak a single word in English, nor could he name any person he had seen in the city. In the present case, none of the three witnesses were contradicted by facts stated by them, nor were there any inconsistencies or omissions, not only in the testimony of each, but in the testimony considered as a whole. In this case, there are no ringing gaps, no incredible testimony, therefore *Quock Ting* cannot be applied.

Petitioner next declares that the lower court completely overlooked testimony by the father-owner that the son was untrustworthy. But when asked if he had ever known his son to lie, Jones, Sr. answered, "No, sir, I have not." (J.A. 24) Additionally, Mrs. Jones testified that she trusted her son. Respondent submits that testimony which shows young Jones was not punctual on one previous occasion is not an indication that Emory Jones, Jr. was "untrustworthy."

As a final point, Petitioner urges that, "At least one other circuit has rendered a decision which conflicts with the instant case on the general legal question of liability of an owner for the negligence of his child's permittee . . . ." (P. 5 his Petition.) His authority for this statement is *Glenn Falls Indemnity Co.* v.

Zurn, 87 F. 2d. 988. That decision involved an interpretation of an insurance policy. The critical question, which the Court answered in the affirmative was whether or not the driver of an automobile, one of three school boys on a joint venture, was covered under a contract which covered any person "using" the vehicle. The father-owner testified that he did not "anticipate" driving by the other two boys, but that he had given complete control and management of the vehicle over to his son. There was no specific instruction which forbade absolutely the driving by anyone except the son. Involved in the case at bar is a statute which has been construed many times by the Courts of the District of Columbia. This statute, as has been stated, was held not to apply in the instant case. Respondent submits that an interpretation of an insurance policy in a court is not the same as a court of a particular jurisdiction ruling on the applicability of a statute peculiar to that jurisdiction. Furthermore, as substantiated by the evidence, the driver was not the "permittee" of young Jones. *Harrison* v. *Carroll*, 139 F. 2d 427, also cited by Petitioner, is distinguishable on the same grounds.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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